

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

Now pending are a number of motions filed after the case was remanded to this Court upon appeal. The motions are ripe, and we now rule on them.

I. Background

19 Plaintiff Richard Chudacoff, M.D. ("Plaintiff" or "Chudacoff")
20 is a physician who was appointed to the position of Assistant
21 Professor with the University of Nevada School of Medicine, and
22 granted staff privileges at the University Medical Center of
23 Southern Nevada ("UMC") in the obstetrics and gynecology department.
24 Chudacoff worked at UMC from December 20, 2007, through May 28,
25 2008.

In 2008, the Medical Executive Committee ("MEC") suspended Chudacoff's obstetrical privileges. Chudacoff requested a fair hearing, but before the hearing was held, Chudacoff was terminated

1 from the University of Nevada School of Medicine. Defendants filed
2 a report with the National Practitioner Data Bank ("NPDB") stating
3 that Chudacoff's privileges had been suspended indefinitely for
4 substandard care and skill level.

5 On July 2, 2008, Chudacoff filed the original complaint in this
6 case. A fair hearing was held, and the hearing committee ultimately
7 disagreed with some of the MEC's determinations. Additional
8 hearings were also held with respect to Chudacoff's quality of care
9 and alleged misrepresentations on his application.

10 While the administrative process was ongoing, this Court
11 granted partial summary judgment in favor of Chudacoff (#109),
12 holding that Chudacoff was denied constitutionally sufficient
13 procedural protections before being deprived of a protected property
14 interest. Ultimately, however, we granted summary judgment in favor
15 of Defendants (#229), finding, *inter alia*, that the individual
16 doctor Defendants were not acting under color of state law and thus
17 could not be liable under § 1983. We dismissed the state law claim
18 against UMC and the Board of Trustess of UMC ("the Commissioners")
19 because we did not elect to exercise supplemental jurisdiction after
20 dismissal of the federal claim. The case was appealed to the Court
21 of Appeals for the Ninth Circuit, and the Ninth Circuit reversed our
22 determination that the individual doctor Defendants John Ellerton
23 ("Ellerton"), Dale Garrison ("Garrison"), Marvin Bernstein
24 ("Bernstein"), and Donald Roberts ("Roberts"), members of the MEC,
25 are not state actors.

26 On August 28, 2009, before we granted summary judgment (#229)
27 in favor of Defendants, Chudacoff filed a second action ("Chudacoff

1 II") in this district against doctors who participated in the second
 2 and third administrative hearings held subsequent to the filing of
 3 the present action. (2:09-cv-01679-RCJ-RJJ.)

4 Several motions have been filed since the case has been
 5 remanded, and are addressed in this Order.

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7 **II. Plaintiff's Motion to File Third Amended Complaint (#359)**

8 Chudacoff seeks to file a third amended complaint to properly
 9 plead claims under 42 U.S.C. § 1983, remove claims that have been
 10 decided in favor of Defendants, and add defendants.¹

11 The Court of Appeals for the Ninth Circuit reversed our
 12 determination (#229) that defendants Ellerton, Garrison, Bernstein,
 13 and Roberts were not acting under color of state law, and ordered
 14 that Chudacoff be permitted to amend his complaint to bring a § 1983
 15 claim against Ellerton, Garrison, Bernstein, and Roberts. Plaintiff
 16 seeks to go beyond what the Ninth Circuit has ordered by including
 17 additional Defendants in his proposed amended complaint.

18 It is the doctor defendants in Chudacoff II that Chudacoff
 19 wishes to add to the present case. In Chudacoff II, Judge Robert C.
 20 Jones granted defendants' motion to dismiss, renewed motion to
 21 dismiss, and motion for summary judgment. Judge Jones held that
 22 Chudacoff's due process claims against defendants who are defendants

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24 ¹ Chudacoff argues that Defendants' opposition is untimely.
 25 Chudacoff filed the Motion to for Leave to File Third Amended
 26 Complaint (#259) on June 27, 2011, before the mandate of the Ninth
 27 Circuit was issued on July 1, 2011. Defendants' response, filed on
 July 14, 2011, is not untimely. This Court granted Defendants
 additional time due to Chudacoff's premature filing of the motion
 (#259).

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1 in our case are barred by claim preclusion. Judge Jones did not
2 find claim preclusion against the new defendants. Instead, he held
3 that issue preclusion barred Chudacoff's claims against the doctor
4 defendants in Chudacoff II based on our determination (#229) that
5 the individual doctors in this case were not acting under color of
6 state law. Chudacoff II is currently on appeal.

7 Chudacoff seeks to add the claims that are on appeal in
8 Chudacoff II to our case. While Chudacoff must be permitted to
9 properly plead his § 1983 claim against Ellerton, Garrison,
10 Bernstein, and Roberts, we deny Chudacoff's request to file claims
11 against additional doctor defendants while identical claims are on
12 appeal in Chudacoff II. Therefore, Chudacoff's Motion for Leave to
13 File Third Amended Complaint (#259) shall be granted in part and
14 denied in part on the basis that Chudacoff may plead a § 1983 claim
15 against Ellerton, Garrison, Bernstein, and Roberts, but may not
16 bring claims against the defendants in Chudacoff II at this time.

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18 **III. Plaintiff's Motion to Strike (#274) Docs. ## 271, 272**

19 Chudacoff requests that we strike documents # 271, 272 on the
20 docket. Counsel for defendants in Chudacoff II filed oppositions
21 (## 271, 272) to Chudacoff's Motion to Re-Open Discovery (#258) and
22 Motion for Leave to File Third Amended Complaint (#259). These
23 filings were inappropriate because counsel for the defendants in
24 Chudacoff II does not represent any of the defendants remaining in
25 this case, and the filings (## 271, 272) shall be stricken.

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IV. Plaintiff's Motion for Consolidation (#276)

Chudacoff requests that we consolidate the present case with Chudacoff II. Federal Rule of Civil Procedure 42(a) provides that “[i]f actions before the court involve a common question of law or fact, the court may . . . consolidate the actions.” Chudacoff II is currently on appeal and is not pending before this Court, and therefore, we lack the authority to consolidate this case with Chudacoff II.

9 In his reply (#297), Chudacoff argues that the Motion for
10 Consolidation (#276) actually requests an indicative ruling on the
11 issue of consolidation. We decline to make an indicative ruling
12 while Chudacoff II is on appeal.

V. Plaintiff' Motion For Reconsideration of (#277) Dismissal of

16 Chudacoff requests that we reconsider the dismissal of Kathleen
17 Silver. The Ninth Circuit affirmed summary judgment in her favor,
18 stating that Silver sits on the MEC, but does so in a non-voting,
19 non-deliberating capacity. Chudacoff's "new evidence" consists of a
20 an email and affidavit stating that Silver "emphasized that it was
21 all personal with Dr. Roberts retaliating against [Chudacoff]."
22 (Pl.'s Mot. for Reconsideration of Dismissal of Kathleen Silver at 3
23 (#277).) This evidence is entirely insufficient for the Court to
24 reconsider the dismissal of Silver. Even if true, the evidence does
25 not show that Silver was an "integral participant" in the
26 deprivation of Chudacoff's rights, as is required for § 1983
27 liability. See Chudacoff v. Univ. Med. Ctr. of S. Nev., 649 F.3d

1 1143, 1151 (9th Cir. 2011). Plaintiff's Motion (#277) shall be
2 denied.

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4 **VI. Plaintiff's Motion for Attorney's Fees (Interim) (#278)**

5 Plaintiff's request for interim attorney's fees (#278) is
6 premature and shall be denied.

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8 **VII. Plaintiff's Motion for Reconsideration (#279)**

9 Chudacoff requests reconsideration of this Court's Order (#229)
10 dismissing Chudacoff's claim against UMC and the Commissioners for
11 breach of the implied covenant of good faith and fair dealing. The
12 state claim was dismissed because we did not elect to exercise
13 supplemental jurisdiction after granting summary judgment on
14 Chudacoff's § 1983 claim. Chudacoff argues that because the § 1983
15 claim against the doctor Defendants has been remanded to this Court,
16 supplemental jurisdiction exists and this Court should allow
17 Chudacoff to pursue his claim for breach of the implied covenant of
18 good faith and fair dealing against UMC and the Commissioners.

19 We reject Defendants' argument that Chudacoff waived his right
20 to bring this motion because he failed to appeal our dismissal of
21 the state law claim. That claim was dismissed because we did not
22 elect to exercise supplemental jurisdiction upon dismissal of the
23 federal claim. The federal claim has been remanded to this Court,
24 and Chudacoff is not barred from arguing that we should allow him to
25 pursue his state claim. Federal Rule of Civil Procedure 60(b)(5)
26 provides that "the court may relieve a party . . . from a final

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1 judgment, order, or proceeding [if] . . . it is based on an earlier
2 judgment that has been reversed or vacated."

3 28 U.S.C. § 1367 provides that "in any civil action of which
4 the district courts have original jurisdiction, the district courts
5 shall have supplemental jurisdiction over all other claims that are
6 so related to claims in the action within such original jurisdiction
7 that they form part of the same case or controversy." While the
8 defendants against whom this state law claim has been brought are
9 third parties to the federal claim against the doctor Defendants, it
10 appears that in the interests of judicial economy, this Court should
11 allow Chudacoff to bring the state law claim against UMC and the
12 Commissioners. The claim is related to Chudacoff's § 1983 claim
13 against the individual doctor Defendants, and had been brought in
14 this case prior to our dismissal of the § 1983 claim. Chudacoff's
15 Motion (#279) shall be granted.

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17 **VIII. Plaintiff's Motion to Re-Open Discovery (#258)**

18 Chudacoff requests that we re-open discovery to allow Chudacoff
19 to amend his initial disclosures to include evidence related to
20 damages suffered since May 2009. Chudacoff also wishes to present
21 evidence of extended harm to his career during the pendency of the
22 appeal. Chudacoff also seeks information Defendants withheld under
23 the "peer review privilege." Chudacoff cites a case from this Court
24 refusing to recognize academic peer review privilege. Williams v.
25 UMC, 760 F. Supp. 2d 1026 (D. Nev. 2010).

26 Defendants oppose on the basis that Chudacoff's requested
27 discovery is overly broad. We agree that Chudacoff should not be

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1 allowed to seek discovery related to the proposed defendants from
2 Chudacoff II. However, we will re-open discovery for a limited
3 period to allow Chudacoff to present evidence of his damages since
4 discovery was closed previously, and to seek any materials withheld
5 under the guise of peer review privilege.

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7 **IX. Conclusion**

8 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Leave to File
9 Third Amended Complaint (#259) is **GRANTED IN PART AND DENIED IN**
10 **PART**. Plaintiff shall have twenty-eight (28) days within which to
11 file a third amended complaint pleading a § 1983 claim against
12 defendants Ellerton, Garrison, Bernstein, and Roberts. Plaintiff's
13 Motion for Reconsideration of the Dismissal of the State Law Claims
14 (#279) is **GRANTED**. The amended complaint may include a claim for
15 breach of the implied covenant of good faith and fair dealing
16 against UMC and the Commissioners.

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18 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Re-Open
19 Discovery (#258) is **GRANTED**. Discovery shall be re-opened on the
20 issue of Plaintiff's damages and any information withheld on the
21 basis of peer review privilege for a period of ninety (90) days
22 following the filing of Plaintiff's amended complaint. Dispositive
23 motions shall be due within thirty (30) days after the close of
24 discovery. A pre-trial order shall be due within thirty (30) days
25 after the date dispositive motions were due, if none are filed, or
26 within thirty (30) days after the date any dispositive motions are
27 ruled upon.

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1 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Strike (#274)
2 is **GRANTED** and documents #271 and #272 shall be stricken.

4 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Consolidate
5 (#276) is **DENIED**.

7 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Reconsider
8 Dismissal of Kathleen Silver (#277) is **DENIED**.

10 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Attorney's
11 Fees (#278) is **DENIED**.

14 || DATED: October 21, 2011.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE